UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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WILLIAM WHITFORD, ROGER ALCLAM, EMILY BUNTING, MARY LYNNE DONOHUE, HELEN HARRIS, WAYNE JENSEN, WENDY SUE JOHNSON, JANET MITCHELL, ALLISON SEATON, JAMES SEATON, JEROME WALLACE, and DONALD WINTER,

Plaintiffs,

-vs- Case No. 15-CV-421-BBC

GERALD NICHOL, THOMAS BARLAND, JOHN FRANKE, HAROLD FROEHLICH, KEVIN KENNEDY, ELSA LAMELAS, and TIMOTHY VOCKE,

Defendants.

Madison, Wisconsin
March 23, 2016
9:30 a.m.

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STENOGRAPHIC TRANSCRIPT OF MOTION HEARING
HELD BEFORE the HONORABLE JUDGE KENNETH RIPPLE,
HONORABLE JUDGE BARBARA B. CRABB,
and HONORABLE JUDGE WILLIAM GRIESBACH

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(Proceedings called to order.)

THE CLERK: Case Number 15-CV-421. *William Whitford, et al. v. Gerald C. Nichols, et al.* Court is called for oral argument hearing. May we have the appearances, please.

MS. ODORIZZI: Michele Odorizzi for plaintiffs.

MR. STEPHANOPOULOS: Nicholas Stephanopoulos for the plaintiffs.

MR. KEENAN: For the defendants, Brian Keenan, and with me is Anthony Russomanno.

JUDGE RIPPLE: Good morning to everyone. We're here today to hear the arguments on the defendants' motion for summary judgment, and as we have indicated, we have allotted an hour to each side for their primary arguments and a half hour for rebuttal for the movants. You don't need to use all the time; you're masters of your own time. But we thought that would be the best way to handle things. We will take a break at some point in

the morning as well. Okay?

So with that, we'll ask the movants to please begin.

MR. KEENAN: May it please the Court. The Court should grant the defendants' motion for summary judgment because there's no genuine issue of material fact that the plaintiffs' proposed standard is not a legal standard by which an unconstitutional partisan gerrymander can be judged. There's no issue of material fact because the defendants' motion is based on the plaintiffs' own expert reports and undisputed results of Wisconsin elections in -- historical elections.

JUDGE RIPPLE: Before you get to that point, and of course it's a very important one, maybe you could spend a little bit of time on the first element of the test that has been tendered by the plaintiffs in the case, the matter of intent. There is disagreement between both of you on that. Could you please describe to us your position and why you think the position taken by the plaintiffs is infirm.

MR. KEENAN: Yes, I will. The plaintiffs have a standard that has three stages and the first is the intent element. The plaintiffs feel that an unconstitutional gerrymander, the intent element, would be established by any sort of partisan intent to favor the party that's districting and disadvantage the party

that's out of control. The defendants see that as an inappropriate and infirm intent element because that type of intent is not actually unconstitutional in and of itself and that's been well established through Supreme Court case law dating back many years to the *Gaffney* decision, I believe in the 70's, and into the *Vieth* decision, recently in the *LULAC* decision; that the use of partisan classifications, the use of a partisan motive isn't constitutional in and of itself. And the problem with partisan gerrymandering claims is determining the level of partisan intent that would move something from being a normal and ordinary consideration, I believe was the language used in *Vieth*, into something that now has turned into unconstitutional.

The defendants don't believe that the plaintiffs' intent element works because it takes just that constitutional motive of partisan intent and finds that's enough to meet the test, then moves it to an effects element that looks at the partisan asymmetry in converting statewide vote shares into seats and counts that entire asymmetry as a discriminatory effect such that you can have a test -- a plan becomes unconstitutional with a bare partisan motive and then a large effect.

JUDGE RIPPLE: So an intent to distinguish one

party from another in gerrymandering is constitutionally permissible and therefore wouldn't be an intent to create an invidious classification? Is that your point?

MR. KEENAN: Correct. And the plaintiffs' standard hasn't attempted to delineate where invidiousness would jump into the --

JUDGE RIPPLE: And then the next point, I suppose, would be well then what is an invidious classification and what would be -- how do we measure the intent to create such an invidious classification.

MR. KEENAN: Well, as counsel for the defendant, it's hard for me to come up with what a plaintiff's standard should be. But I think invidiousness should have to be measured by, as Justice Kennedy has outlined in his *Vieth* concurrence, some sort of departure from normal districting principles and criteria.

JUDGE RIPPLE: Let me see if I could help you on that. Suppose the plaintiffs were able to prove that the defendants had the intent to create a plan that would simply not be subject to change for the entire decennial period; in other words, that would be frozen in place with no possibility of a flip for the entire decennial period. Would that be a sufficient unconstitutional -- invidious -- would that be a sufficient intent to create an invidious classification?

MR. KEENAN: No, it would not.

JUDGE RIPPLE: Why not?

MR. KEENAN: And I assume you're referring to a flip of the efficiency gap and not a flip of control of the legislature?

THE COURT: Flip of the control of the legislature is what I was --

MR. KEENAN: Oh, control of the legislature. I still think that would not necessarily show invidiousness. That invidiousness would have to be shown -- how does that result differ from a plan that's enacted using solely traditional districting principles.

JUDGE RIPPLE: Well, that would be the third element and one where we'd have to deal with allocation of burden of proof later on. But just in terms of the first element, the intent, would it be enough if we could -- if the plaintiffs could prove that the intent was to create a plan that would be in concrete for the ten years; no possibility this thing was going to create a legislature with another party in leadership.

MR. KEENAN: I don't think that would necessarily be enough and I think it would depend on the state and it would depend on the electoral circumstances. I can imagine there are states where it's practically impossible for one of the parties to win control of the

legislature if there's so much support for one of the other parties in that --

JUDGE RIPPLE: That's the key. What would be enough then in your view?

MR. KEENAN: I'm not sure that this is something that can be solved. The *Vieth* plurality examined a predominant intent test that looked at the *Vieth* plaintiffs' offer that the partisan advantage outweighed all the other concerns of districting like equal population and Voting Rights Act and compactness, contiguity, things like that, and the *Vieth* plurality found that to be just completely unworkable because on a statewide basis, it was just impossible to determine the relative weight of all these different factors. To me it's hard to see how, and this has been the problem that's plagued these cases since *Bandemer*, is what -- how do you establish some sort of intent where it goes beyond the normal to something abnormal that's unconstitutional. No one else has been able to figure it out. I don't know that I can. And I think it would be challenging to delineate a line anywhere that would show that.

And I think one of the concerns is that embedded in the question was that there's an assumption that things would never change and I don't know that that's even a valid assumption to make about the future. For example,

the *Vieth* case itself, the plaintiffs allege that the Democrats would never be able to win a majority of the congressional districts in that case. It went up to the Supreme Court. In 2004 they lost. Well, in 2006 the Democrats won a majority of the congressional seats in Pennsylvania, and again in 2008, they were able to secure through the political process what they claimed in court was going to be impossible. So I don't know that it's possible to even make a prediction about the future as to what the likely consequences are of a plan over a ten-year period, at least with a certainty enough to say something is unconstitutional.

JUDGE RIPPLE: Thank you for your views on intent. I interrupted you. You may want to go on and talk about the efficiency gap.

MR. KEENAN: Sure. Well, the intent was one of my elements, so it just kind of leads me into my argument about the plaintiffs' intent element seems to focus more as a way to avoid the consequences of the efficiency gap rather than actually showing how much partisanship is too much. The plaintiffs, as I'll show, the efficiency gap ends up capturing a large number of plans as presumptively unconstitutional. The number of plans that have large efficiency gaps that trip the various thresholds the plaintiffs would want to establish is

quite large and the plaintiffs use the intent element mainly as a way to try to prevent the -- to avoid the consequences of this, which would be to show that a large number of plans that have no partisan intent at all are showing this asymmetry and thus aren't partisan gerrymanders and this asymmetry is present when there's no partisan intent. And the intent element mainly serves as a way for them to say well hey, our test doesn't actually capture the Wisconsin 2000's plan. That doesn't have intent. But I mean the defendants' argument is that that just shows that the efficiency gap is a poor metric for measuring partisan gerrymandering.

JUDGE CRABB: I have one question. For the purpose of summary judgment, are you denying that the legislature had any partisan intent when it -- you're not.

MR. KEENAN: No, we're not.

JUDGE CRABB: That's good.

MR. KEENAN: Our argument is that even assuming there's partisan intent and that there was some partisan intent, that the standard still doesn't work.

JUDGE GRIESBACH: For purposes of trial would you even deny the Court is partisan?

MR. KEENAN: No, we would not plan to dispute that at trial either.

JUDGE RIPPLE: Would you dispute the fact that they had the partisan intent to attempt to create a plan that would stay in place throughout the decennial period that would be not capable of producing a legislature in control of the other party?

MR. KEENAN: Yes, I think we would dispute that.

JUDGE RIPPLE: You would dispute that.

MR. KEENAN: Yeah. I mean that's not in the summary judgment record, but I think at trial to the extent --

JUDGE CRABB: You would dispute it as to whether that was the intent or whether that was what actually happened?

MR. KEENAN: I think whether it was the intent and then whether it actually does happen is in the future and so I wouldn't really be able to say what will happen.

JUDGE GRIESBACH: Is your rejection -- and this may be jumping ahead and I'm sorry if I am. But is your rejection of the efficiency gap -- I take it it's not just the level that the plaintiffs argue. Is there no efficiency gap that you think would be unconstitutional if it's the result of redistricting?

MR. KEENAN: Yeah, I think it's a two-fold thing. One is just that the efficiency gap has no tie to a constitutional violation so that a high efficiency gap

just doesn't show a constitutional violation in and of itself. But then secondarily, that even the levels that the plaintiffs have suggested end up presenting themselves in cases where there's no partisan intent. So it's not even showing any sort of gerrymandering at all.

But I think one of the important things is that the efficiency gap, and hopefully the brief has made clear the different versions of the efficiency gap that are used by the plaintiffs, that the historical analysis that they've used by Professor Jackman to set their thresholds is based on a seats-to-votes line that expects a party to win a certain proportion of seats in a legislature based on their percentage of the vote share. That's based on a two-to-one slope.

So I mean the way to kind of understand that, I think, is in simple terms that a 51 percent vote share is implied that they should win 52 percent of the seats. And then a 52 percent vote share is implied to win 54 percent of the seats. You kind of get a bump in seats for each vote share. And we agree that's not saying that proportional representation is required, but we think it's actually worse in that it's judging plans based on how they deliver hyperproportional representation. For example, you could have perfectly proportional representation in an efficiency gap if -- and this is

what happened in Wisconsin, I believe, in 2008 is the Democrats won 54 percent of the vote and win 53 percent of the seats roughly proportional. But the efficiency gap implies that they should win 58 percent of the seats. And so therefore you still get a negative 5 percent efficiency gap when you're delivering roughly proportional representation probably as close as you can in a situation like this.

And so we do think that there's no tie to the constitution such that the efficiency gap just has a fundamental problem being used as a test irrespective of the particular level that ends up being reached.

JUDGE RIPPLE: Isn't it a test though that at least is helpful in measuring the degree to which the plan might be susceptible to producing a legislature that would be dominated by the other party?

MR. KEENAN: I would say not necessarily. It's more concerned about how the vote share matches up with the seat share. So for example, our expert, Sean Trende, went through, and there's a list of 17 plans that were unambiguously one side or the other that Professor Jackman found through time. That means that they were always either negative or positive every single election in them. And what Sean Trende found is that in a number of those plans, the control of the legislature actually

flipped even though the efficiency gap sign stayed the same.

And I think some of this is illustrated by the New York example which keeps appearing as an efficiency gap, negative efficiency gap favorable to Republicans even though the Democrats actually control the New York legislature quite a bit of the time. And the reason the efficiency gap presents itself is that maybe the Democrats have 55 percent of the seats, but they actually won 60 percent of the vote which implies that they should win, you know, 70 percent of the seats. So you end up with a large efficiency gap.

JUDGE RIPPLE: Mr. Keenan, on that point I'm beginning to have a little bit of trouble keeping the summary judgment matrix in place. Is that argument -- I can see how that argument might be very helpful to you at trial in impeaching the position taken by the plaintiffs and their experts, but how is it helpful to you in prevailing in this motion for summary judgment?

MR. KEENAN: Well, because all that information is just taken straight from the plaintiffs' reports. That's undisputed that this is what is happening.

JUDGE RIPPLE: You're talking about Professor Trende and Professor Trende's views on things.

MR. KEENAN: Well, Professor Trende looked at

what Jackman had done and just looked at -- and the plaintiffs haven't disputed that that's, in fact, what happened in these cases. So that's an undisputed fact.

And so I think the efficiency gap is -- what it shows is that -- is how a party can convert statewide vote share into how they compare to, like, the two-to-one vote curve, two-to-one seat-to-vote curve. So that's what it tells you. And then it actually doesn't tell you much about who's going to win control of the legislature. I mean some of the examples here are 1994 is the last year Wisconsin had a positive efficiency gap, which is a gap that favors Democrats. Well, 1994 was the first year that Republicans won control of the legislature in Wisconsin -- or the Assembly in Wisconsin in a number of years. So it's like in a sense, it's the worst year for Democrats electorally, but it looks like under the efficiency gap a good year for them. And the most favorable, so to speak, year for Democrats on the efficiency gap in the last plan was 2010, it was negative 4, and that was also a year where the Republicans did very well and won 60 seats and a large vote share, like 54 percent, I think.

So the efficiency gap does not correlate necessarily with who's winning control of the legislative seats. It's measuring who is getting more or less seats compared

to what you would expect under this vote line.

JUDGE CRABB: I wanted to ask you about clustering because I understand that you're arguing that the maps are pro-Republican because Democrats naturally cluster more. Is that a recent trend?

MR. KEENAN: We believe that it's a fairly recent trend, and it shows up in the Jackman report starting in the mid 90's, and that's when the efficiency gaps naturally start changing in favor of the Republicans and it's continued through the 2010's and -- or 2000's and 2010's.

JUDGE CRABB: Do you have evidence that the Democrats have been more clustered in recent years?

MR. KEENAN: Our evidence would be -- yeah, would be the Sean Trende analysis that we performed.

JUDGE CRABB: That's your only evidence?

MR. KEENAN: Yes. And then just the inferences from what's happened through Jackman's own report which shows the trend. And I would say that I think -- it's important to note that we aren't asking the Court to make a finding on that basis. We don't think we need to make a finding -- the Court needs to find that. The fact that the high efficiency gaps present themselves in plans with no partisan intent shows that it's not a discriminatory effect and it shows that it's not something that's

necessarily inconsistent with traditional districting principles. We have provided the analysis to provide some context so that the Court could understand, like, was this just -- is it an accident that Republican-favored efficiency gaps are more durable; that they're more common; that even in neutral plans that we see pro-Republican efficiency gaps more commonly than Democratic efficiency gaps.

JUDGE CRABB: But isn't it the case that there's quite a bit of clustering of Republicans?

MR. KEENAN: There is. I mean that's true. I mean there's clustering of all groups. And so the question is how does that clustering then affect the ability to win states on a sea wide -- seats on a statewide basis. And then, for example, the clustering of Republicans isn't quite at the level of the Democrats. If you look at -- for example, Waukesha County is used as the, you know, Republican equivalent. And if you look at the City of Milwaukee, they're both fairly strong for each party, but Milwaukee votes more strongly Democrat than Waukesha votes Republican.

So when you're tallying up wasted votes district by district, Republicans will win all seats in Waukesha, Democrats will win all seats in Milwaukee. But Democrats will just have more wasted votes because if you win the

district 90 to 10, you'll have more wasted votes than winning at 80 to 20 or 75 to 25. And so when you do a wasted vote analysis, it ends up going one way or the other.

JUDGE CRABB: But if you have a lot of clustering for both parties, you have all these counties in southeastern Wisconsin that are heavily Republican and you have clustering of Democrats in three cities, why are the Democrats always hurt by the clustering and the Republicans are not hurt by the clustering?

MR. KEENAN: Well, I think in some ways it's -- I think the answer isn't always knowable why certain districts vote certain ways. But I think one of the problems is that just drawing those districts in the outer areas that aren't really strongly one or the other, you're going to end up with fairly close districts and then you end up drawing them. If you're looking at statewide vote share and a big chunk of that is taken up by safe seats, which is true in the case of Democrats, then there just aren't as many of them in the outlying areas. And the Republican vote share, if it's 75 percent in Waukesha, there's still more vote share out in the outlying areas where it's available to win legislative seats.

I do want to be clear that we don't think on summary

judgment it is necessary to make any sort of finding like this. It's something that's occurred in many different neutral plans. Our main argument is that the presence of a high efficiency gap doesn't show -- departure from districting principles doesn't show discrimination and doesn't show -- on a more fundamental level is just not based on the constitution.

JUDGE CRABB: It could show discrimination, but not a kind that has been recognized.

MR. KEENAN: Yes, perhaps.

JUDGE RIPPLE: If we were to assume for the sake of argument that whoever we decide has the burden of proof but nobody can show that these neutral factors of political geography really impact or justify the plan, impacted the plan, does the efficiency gap then take on a new meaning if that's really -- if we were to determine that?

MR. KEENAN: I don't believe so.

JUDGE RIPPLE: Why not?

MR. KEENAN: Well, the efficiency gap still is just measuring how you conform to the two-to-one vote share. It's still not based on the constitution. It is showing how you convert a statewide vote share into seats, but that's not based on the constitution. As well, it is affected by a host of other factors in the

sense that really the legislature -- legislative races come down to -- I think we've shown that in 2012 five seats were decided by .1 percent of the vote, which can swing the efficiency gap a lot one way or the other. That in a sense, it's more important where you get your votes rather than, like, what your statewide vote share is when it comes to winning legislative seats. So I still would think the efficiency gap doesn't provide much, and even so -- I mean the last plan was enacted with no partisan intent. It had certain effects that were seen. Those were caused by something. We don't know -- I think it's many different things: You know, concentration; it's the candidates; the amount of money spent; the issues that were salient at a certain point in time, things like that that I'm not sure how you can distinguish how much of a efficiency gap is really made up of discrimination or partisanship versus other things.

JUDGE CRABB: So your position is that efficiency gaps are not particularly helpful in deciding whether there's been overly partisan redistricting.

MR. KEENAN: Correct. Basically, yes. Good summary. Thank you. And I think a key point here is that the plaintiffs style their test as partisan intent and partisan effect, but it's not a partisan effect that's unconstitutional; that the language used in

Bandemer and that was used by this Court in its ruling on the motion to dismiss is the discriminatory effect. And so we don't think that an efficiency gap can really show a discriminatory effect when, for example, there was a 12 percent efficiency gap under a plan with no discrimination at all and then now there's a 12 percent efficiency gap in a plan that has partisan intent, that that actually shows any sort of discriminatory effect. I mean it shows an electoral effect, but it doesn't show a discriminatory effect. And I'm trying to use the word partisan effect as sort of like muddying the waters and not actually tieing this to the constitution, which is a discriminatory effect.

And then I think a further problem is then -- we talked about the intent and the fact is then this burden shifting. Third step that the plaintiffs have proposed, which they say is based off of the one-person, one-vote cases, but the burden-shifting analysis that the plaintiffs have provided is actually not at all like what's done in one-person, one-vote cases. In one-person, one-vote cases the court examines not whether something is a necessary consequence or an unavoidable consequence, which is the language the plaintiffs use, it's whether the plan may reasonably be said to advance the rational state policy of, for example, preserving

subdivision lines or county lines or whatever the rationale is for the departure from the equal population. And I got that from the *Voinovich v. Quilter* case.

And the plaintiffs, it seems that the burden shifting is all that's required is then to produce an alternative plan that meets a few benchmarks and then you've met this, where -- I mean there's no discussion of whether things advance state policy, whether the justifications -- and I believe that's because once you get into that realm, now we're in the judicially manageable -- a problem of judicial manageability and weighing who districts better, who's more complying with districting principles, and that there's really no way to judge that once, if you're going to do a true burden shifting where there's some sort of like weighing of the interests and determining whose -- like whether the plan meets certain criteria, the plaintiffs basically have said well, we put forward a plan that is equivalent to your plan, therefore, you know, sorry, your plan is unconstitutional.

JUDGE RIPPLE: Wouldn't you have somewhat of a better idea of exactly what of the so-called politically neutral elements in drawing up a plan might have been used and why they were used on the other side? Isn't that a good reason to put a burden on you to at least

make some showing with respect to -- with respect to how this whole thing is explainable by these so-called neutral factors?

MR. KEENAN: Well, I don't know that we would necessarily -- the plaintiffs would be free to take discovery and they can analyze the plan on all the various -- whatever various factors they can analyze on: compactness and equal population, things like that. There was a large amount of discovery in the prior litigation, the *Baldus* case, about what the process that went into the districting and things like that. So I mean in a sense I would say no, and then also that the burden is on plaintiffs to prove a violation of the constitution and I would say especially in this case where there's -- it's hard for courts to find a manageable standard. This process is entrusted to legislative branches who have exercised that process who were elected fairly under a neutral plan, even in a statewide governor's race, and so I would say that no, the burden should still remain on the plaintiffs.

THE COURT: Mr. Keenan, you touched on an ancillary problem that I know concerns at least me and that is to what degree can we take judicial notice of the proceedings in the earlier case?

MR. KEENAN: By earlier case you mean the *Baldus*

case?

JUDGE RIPPLE: Yes.

MR. KEENAN: I would think what's in the -- what is in the record in that case would be available for judicial notice and then the decision itself. I would also say the same would be true for the *Baumgart* and the *Prosser* cases, which were the districting cases that enacted the 90's plan and the 2000's plan. I mean I would say, like, perhaps to the extent there's issues with -- I would say, like, testimony that was given in those cases might have to be regiven here in the sense that there was different issues and so I don't know that, and we didn't have a chance to ask witnesses followup questions or things like that. So I might have a problem with that kind of thing.

But in terms of the -- you know, things that happened, I would say like the opinion in the *Baldus* case or generally I don't necessarily have a problem. There may be some things where we would have a problem with the testimony if it wouldn't meet the criteria under the rules.

JUDGE RIPPLE: There's an intermediate position we could take on this last element of the plaintiffs' case as well. Rather than saying you have the burden of proof, we could say you at least have the burden of going

forward, of suggesting what the neutral factors that might justify the plan are, keeping the ultimate burden of proof on the plaintiffs. How does that sound to you?

MR. KEENAN: Well, it's better. I would still say it's a little bit -- I'm not sure how it would work given that I think we'd still need a standard by which that would then be judged. I think that's where the problem comes in is that we could have witnesses testify about the reasons that went into the districting, but then -- and the plaintiffs would have the right obviously to present evidence on their opinions on that and facts and then ultimately what's -- how is the decision made.

JUDGE CRABB: You're not really disputing that the Republicans drew this plan with the desire to create the best possible election process for the Republicans, are you?

MR. KEENAN: I would say I would dispute whether it's the best possible.

JUDGE CRABB: I'm not saying it turned out to be the best, but that their intent was to do the best job they could to safeguard the common seats and to increase the number of seats that would be available to Republicans.

MR. KEENAN: I think -- I'm not disputing that they districted with partisan advantage. I think there's

a problem with saying they would -- for example, the language the plaintiffs use of maximizing Republican advantage or making this the best map possible in the sense that -- and I guess we're going away from the summary judgment record here -- but this would be at trial that --

JUDGE CRABB: Right.

MR. KEENAN: -- there's competing factors here that go into the districting plan which would be to have a plan that passes the House and the individuals who vote on that are most interested in what their individual district looks like, whereas perhaps the Republican Party as a whole is interested in what the overall map looks like and that the best map for Republicans might be the most districts at 52 percent Republican, but that the individual legislators may not really want to be running in a district that's only 52 percent Republican but would rather be 55 percent Republican or 60 or, you know. And then there's balancing of all sorts of different concerns.

So I think after the fact you probably could reverse engineer a map that's even more favorable to Republicans, but -- so I would say in a sense, yes, we're not disputing that there's partisan advantage being looked at. But the level of it and maximizing the Republican

advantage or making the most favorable plan, I don't know that that's really what is the case.

JUDGE GRIESBACH: Well, you wouldn't dispute though, as going to the third prong, you wouldn't argue that you were compelled by traditional factors or other considerations such as population and voting rights considerations to adopt the plan you did.

MR. KEENAN: The specific plan, no.

JUDGE GRIESBACH: And that's the third prong. So really there is no issue on the third prong, is there? If we adopt the plaintiffs' test and accept -- I don't think there's a dispute on intent. And if we say 7 is a sufficient efficiency gap to presume unconstitutionality, they win, don't they?

MR. KEENAN: I mean I think they way they've phrased their test, they do, because I think any plaintiff that gets to make up their own test would make one that they would win. But I guess our point would be that --

JUDGE GRIESBACH: I mean at trial there's nothing to try on the third prong, is there?

MR. KEENAN: The way they phrased it there isn't and that's why we think it's --

JUDGE GRIESBACH: Well, is there another way of phrasing that that you think would leave you something?

I mean once -- if we adopt 1 and 2, 3 follows necessarily, doesn't it?

MR. KEENAN: That's been our argument. Then it seems like it's not even really a burden shifting because I don't know that there's any plan that's required to be adopted.

JUDGE GRIESBACH: Right.

MR. KEENAN: I mean there's any number of plans.

JUDGE GRIESBACH: For considerations, they give you a whole range of plans you can adopt and obviously the intent was to adopt one that was electorally advantageous to the Republican Party that was in control.

MR. KEENAN: Correct. And our position is that there's nothing unconstitutional about that; that basically there's nothing unconstitutional about the Republicans winning control in 2010, deciding to enact a plan that is favorable to themselves, even more favorable than the prior plan had been. Conversely there would have been nothing unconstitutional had Democrats won in 2010, unified control, and actually a plan that was more favorable to themselves than what a neutral plan conceivably would have been. That partisan motive just isn't unconstitutional. And then moving to the efficiency gap, that's not showing discriminatory effect.

In a sense I think you're also showing -- the

asymmetry here is that working off of the baseline of the 2000's plan, which was favorable to Republicans, the Democrats could have engaged in conceivably what's traditionally understood as gerrymandering, drawing strange districts, kind of ignoring some districting principles, and maybe end up with even still a negative efficiency gap, maybe a slightly positive one. And that kind of escapes review under this plan because perhaps there's a limit to what -- you know, how positive an efficiency gap can even be in Wisconsin if we've only seen a plus two as the most favorable to the Democrats in the last 20 years or 24 years. I think that's our example that we showed with Illinois which, using Jackman's numbers, was alleged to be a Democrat gerrymander. Jackman finds that even at one year, it actually was a pro-Republican bias map even though it was a Democratic gerrymander. I mean Democrats would seem to be -- might be able to be free to gerrymander under this standard because they would just, like, escape review because the efficiency gap wouldn't get to such a level.

Jackman finds that it's rare to have Democratic efficiency gaps that exceed the 7 or 10 percent threshold in the first election, or as is relatively common for Republican plans, seems to be an asymmetry, which a standard is going to be applied differently depending on

the party in control.

JUDGE GRIESBACH: Even the Demonstration Plan here has a small Republican efficiency gap.

MR. KEENAN: That's true.

JUDGE GRIESBACH: What does that tell us?

MR. KEENAN: I think it tells us that the natural baseline of any sort of plan is going to end up being a pro-Republican plan, and in Wisconsin as of now, who knows what that becomes in the future, but I mean Ken Mayer's plan, the Demonstration Plan, it was a negative 2.2 when he did his no incumbent, every seat contested. Then when he, in his rebuttal report, added back in the incumbency effects, it turned into, I believe, a three-and-a-half percent efficiency gap in favor of Republicans, which is half the way to the presumptive unconstitutionality, and this is, you know, a districting by someone who's, you know, hired by Democrats to draw a plan that's less -- that isn't discriminating against them and his plan shows a negative three-and-a-half percent efficiency gap.

You know, I think he doesn't determine what it would be in 2014 when things change, so I mean it's conceivable they would even have a negative 7 percent efficiency gap under that plan in 2014.

JUDGE GRIESBACH: And is that a

reverse-engineered plan?

MR. KEENAN: I think it is because it's taking the electoral results that happened after the fact, going back and then districting to get particular results, which as I said before, I mean I think you could do that after the fact. You can look at what the election results were, you know what they were, and then you back -- kind of like work your way back to what the district is going to be so then you can say well yeah, the Democrats would have won the seat with 50.2 percent of the vote. Ahead of time I don't think you would really know one way or the other what exactly is going to happen. I mean you can make predictions, but in a sense Mayer is making predictions about the past about what already happened. And so yeah, I think it is a reverse-engineered plan when you get to district after the election has already occurred. You can get the result you want.

I think another problem with the standard here is it doesn't meet what Justice Kennedy has been calling for in a standard in his *Vieth* concurrence when he held out hope that perhaps some day a standard would emerge that courts could apply; that he wanted a limited and precise rationale that could correct any existing violation of the constitution. What Professor Jackman's own numbers

show is that at the 7 percent level, which is what the plaintiffs have offered, 36 percent of all plans had an efficiency gap above 7 percent in their first election. So it shows a fairly common thing, you know, when over one-third of plans are tripping this threshold.

Now, he finds that an acceptable level because out of that 36 percent, he believes that they won't change sign over the course of the plan. That's a key fact he uses; that when you look at the first election, you see a 7 percent gap. It's unlikely that the plan is going to then flip to have a positive EG at some point. We would say that's not tied to the constitution either, to have a plan that flip sign. But I think it also, I mean, shows that just the level of intrusion this could be.

In the response, the plaintiffs say well, 16 percent of those plans wouldn't actually be affected because they had no partisan control. So you're down to 20 percent of plans that had unified partisan control and the 7 percent efficiency gap. I think that shows still that one-fifth of plans are being roped into this standard which isn't -- doesn't seem to me that that's what Justice Kennedy envisioned in his *Vieth* concurrence.

But second, I think it shows that when 16 percent of plans have the 7 percent efficiency gap with no partisan control, it just highlights why the efficiency gap isn't

connecting up with any sort of discrimination or discriminatory effect or constitutional violation.

Even upping the standard 10 percent in the first election, 18 percent of plans had an EG above 10 percent in their first election, so now we're talking about one in five plans are above 10 percent. That's made up of 10 percent of plans with unified partisan control and 8 had no unified partisan control. So even at 10 percent as relatively common, 8 percent of all plans trigger the 10 percent threshold with no partisan control at all. So I think it shows that even these high efficiency gaps aren't really all that uncommon and so they can't really be seen as outliers of extreme partisan gerrymandering when they're showing up in, you know, 8 percent of -- like one-fifth of all plans have a 10 percent efficiency gap in the first election and then it's not that uncommon.

I think the Jackman standard too is -- I just want to be clear on what he actually did -- is that he examined the -- for example, you could look at the Wisconsin plan. He just looks at what the first EG was and then does an analysis looking at the next EG's in line. So say Wisconsin in 2002 had a negative seven-and-a-half EG, that would count as a negative seven-and-a-half. And then he looks at the future

results and sees what happened. But I would say that this -- it shows what happened in the future, but it's not necessarily a guide to what's going to happen -- or it shows what happened in the past; it's not necessarily a guide to what will happen in the future in the 2022 election, 2030 election which is when the standard was, should the Court adopt the standard, that's when this is going to be applied in full. It would be in the 2022 election.

Actually, I believe it's 53 percent of plans have an EG above 7 at any point in their existence, so it's like half of plans are triggered in that threshold. If you don't just limit yourself to the first election, you look at all of them in the plan.

And a plan is just going to produce a range of results. The first one isn't magic or anything, it's just what happened to occur first. And as a necessity, the plaintiffs are relying on that because that's what a plaintiff would look like is the first election. But where does that election fall on the spectrum of what this plan could expect? You know, we don't know.

If you look at the Wisconsin 2000's plan, the gap was negative seven-and-a-half, I believe negative 10, negative 12, negative 4, negative 5, something like that. Any one of those could have occurred first. So if, say,

the waive election of 2012 happened in 2002, well now it's a negative 4 percent efficiency gap in its first election escapes review, even though it goes on to produce efficiency gaps of negative 10 and negative 12. If those negative 10 and negative 12 show up first, well now it seems like this wide extreme partisan gerrymander when it did produce gaps of negative 4, negative 5, and negative 7.

So just conditioning on the first election is a little bit difficult because there's no way to know where does that fall, how is that representative of the whole. Jackman has done a historical analysis, but going forward in the future it's hard to say how that's going to play out. I mean you could even adopt the standard, have the Republican waive election in 2022 and have a bunch of plans escape review as gerrymanders even if they were because 2010 is the lowest EG that Wisconsin saw since, like, 1996 maybe, and that was actually a really good Republican year. So if that year happens in the first year, the efficiency gaps are low and you're evading review.

Or conversely maybe you just have a fluke year where there's a lot of high efficiency gaps that will eventually move down for whatever reason in 2022. Would those be unconstitutional? Everyone has to redistrict

when it was just a fluke election year that caused that result or perhaps even a fluke election in one state that caused a high efficiency gap and then you would expect maybe it will normalize over the rest of the plan.

I just had a question about the motion in limine, whether I should address that now or should I wait until the plaintiffs go.

JUDGE RIPPLE: I think you can go right ahead and address that now.

MR. KEENAN: Okay. On the motion in limine, our point mainly is that at this point in time, the Court need only resolve the parts of Mr. Trende's opinion that were actually submitted on summary judgment. And those aren't actually even disputed, like the opinions he offered aren't disputed. What's disputed is what the Court should make of those opinions. The plaintiffs don't dispute that he accurately -- that he accurately calculated the partisan index the way he did. They don't contest that he accurately cites the vote totals that he cited that we used on summary judgment. In that sense I think there's really no reason to exclude that evidence given that they didn't contest it.

JUDGE GRIESBACH: Is that expert testimony or are those historical facts?

MR. KEENAN: In some sense they're historical.

I would say that the election results are historical facts, but you kind of need a way to get them in. The partisan index, I think, is more of an expert analysis because it requires some calculation, although, I mean -- yeah, I would say that partisan index is more along the lines. But for example, Trende's reliance on the fact that Bill Clinton's election results, how his vote, statewide vote share compared to Obama's in 2012, I mean you could get that from the GAB website and the Wisconsin Blue Book. We need a way to get that into the evidence.

But -- and I think the plaintiffs' motion more broadly suffers from a -- stems from a false premise that you need to be a Ph.D. in political science who publishes in peer-reviewed journals in order to be an expert witness. That's definitely not the case. Someone just needs to be qualified. We believe Mr. Trende is qualified, that he's a professional elections analyst who's --

JUDGE CRABB: What would you say his qualifications are?

MR. KEENAN: Sure. He has a master's in political science from Duke University. He's --

JUDGE CRABB: Was he specializing in any kind of election analysis?

MR. KEENAN: I think it's just a master's in

political science. I don't -- he has written now for, I believe it's seven or eight years professionally as an elections analyst for a website called realclearpolitics.com.

JUDGE CRABB: There's no peer review of that.

MR. KEENAN: No, there not, and there doesn't need to be peer review of experts when they testify. That's one factor that the courts can consider, but I think the *Kumho* case and the Seventh Circuit cases made clear that peer review isn't required.

I will say that the plaintiffs rely on some things that aren't peer reviewed. Everything that comes before a court doesn't need to be --

JUDGE CRABB: But it is something to be considered if it does exist.

MR. KEENAN: Correct. He has written a book on demographic trends in politic study in American history from, like, the 20's onward and the part shifts and parties in their coalitions and their demographics. It's called *The Lost Majority*. He's contributed to a number of books and written articles. He writes professionally just day-to-day on elections using statistical analysis to look at election results and project elections and also, like, analyze past elections.

So we think he's well qualified to offer for what we

offered him for which is to provide some context and history as to elections that occurred in Wisconsin and how Wisconsin has changed over time, which I mean I think we also have to be clear that we're aren't offering -- what we're offering it for is that, not some sort of, like, overarching theory of redistricting or that he's going to come up with a quantifiable number as to what the expected efficiency gap is going to be or anything like that. We just thought given the plaintiffs' analysis by Mr. Jackman is looking over time at election results, someone should look at the history of how those election results have actually occurred, how has it changed over time, and that would be useful to the Court in trying to evaluate whether the efficiency gap is really a standard that should be adopted by the courts. Because they use -- they're basically using historical averages and what's happened in the past that without context, it's really hard to determine whether someone should treat what's happened in the past is what should continue on in the future as a legal standard or is it something that was the result of a particular moment in time.

JUDGE CRABB: What do you understand his basis is for saying that the reason that the Republicans have gained more seats in state legislatures is because there

are just natural pro-Republican advantages?

MR. KEENAN: Sure. It's based of his study of presidential election returns.

JUDGE CRABB: What kind of study did he make of the actual numbers of Republicans in certain districts as opposed to the number of Democrats?

MR. KEENAN: Well, what he does is he looks -- he doesn't -- you don't look at specific districts, because those can change. So we need to look at --

JUDGE CRABB: Well then let's say the state.

MR. KEENAN: Yeah. So what he does is he looks at election results on smaller levels, like the counties or congressional districts, and then sees how has that changed over time. Where was the Democratic strength and the Republican strength versus now? So -- and what he does is he uses presidential vote share, which is recognized as an indicator of partisanship that you could expect. I mean parties go above and below that, but it's a baseline measure for partisanship. And then he adjusts that based on the electoral conditions of that year. So that the partisan index is a way to control for the fact that, for example, the presidential vote in 1984 is very Republican for Reagan. It's more Democratic obviously in 2008 or 2012 when Obama wins. But you wouldn't necessarily think that's always going to be the case that

the presidential vote share, so you take it back to the national average with the partisan index. And he just compares how does that differ over time. So it's a way to see what does Wisconsin look like in '88, '96 versus today. Does it look the same? Does it look different? And it looks very different.

That's basically the basis is the presidential vote share and then compare using the partisan index, which is controlling for the national vote share. So who is more or less, you can look at it either way, Democratic or Republican in the nation as a whole, what parts of the state. So obviously Milwaukee ends up being more Democratic than the state as a whole or the country as a whole, so that shows up as a Democratic strength in all years. But then you can also measure well, how much more is it in each year and it's actually more strong now than it was in the past. So it shows increasing concentration. So that's a basis for his opinion.

I think -- you know, I think the plaintiffs' criticisms of the opinion, they're fine to raise on cross-examination. The Court can take those into consideration when considering Mr. Trende's opinions. We don't think they're a reason to, like, not hear him at all. And we think, with respect to the motion more broadly, that really now isn't the right time to rule on

it; that the preferred procedure would be to hear him testify. We don't disagree that *Daubert* still applies in a bench trial, but that the *Salem* case and the *Medavante* case, I believe, are the ones that say a court -- you know, let the expert witness testify and then after the trial, the Court can make the *Daubert* findings after hearing the expert himself explain his qualifications and his reasoning and see the cross-exam and see all that and then make the *Daubert* determination. We think that's the process that should be followed here.

We think that basically if you read the plaintiffs' motion, a lot of it is this quibbling about methodology and it's not about what he himself did, but about what should the Court make of this. They say well, this isn't useful. Well, that's more an argument to the Court about what usage you make of his analysis rather than not letting him testify and offer the analysis in the first place.

I guess I'd say to the extent that the Court does want to rule on it, like the entirety of the motion before trial, that seems like it can even still do that on a more regular schedule when motions in limine would come before the court -- before, like, in general when most motions in limine would come rather than now. I think it only needs to rule on the summary judgment

portion of it for summary judgment. We think you could probably even avoid that because I think the plaintiffs' standard fails, even assuming that none of Trende's opinions that were cited in the summary judgment materials are adopted.

So I guess I may have more to say about it in the rebuttal after I hear the plaintiffs on their motion, and same with -- I think I'm done with the summary -- my main argument on summary judgment unless there's further questions from the Court.

JUDGE RIPPLE: I don't think so, Mr. Keenan. Thank you very much. The Court will take a ten-minute recess before we hear from the plaintiffs.

(Recess 10:30-10:41 a.m.)

THE CLERK: This Honorable Court is again in session. Please be seated and come to order.

JUDGE RIPPLE: We're ready to hear now from the plaintiffs. Ms. Odorizzi.

MS. ODORIZZI: Thank you, Your Honor. Michele Odorizzi for plaintiffs.

With the Court's permission, we'd like to split our argument, and I'm going to talk about intent, the relationship between the intent and effects prong, clustering in the Trende motion, and Professor Stephanopoulos is going to talk about the efficiency gap,

our Demonstration Plan, and our third prong.

JUDGE RIPPLE: That's fine.

MS. ODORIZZI: Okay. Thank you, Your Honor. We were a little surprised to see in defendants' reply brief that they argued that -- about the legal test for intent because we really didn't see that in their opening brief, which probably in some sense they probably waived it by not raising it in their opening brief. But in any event, their argument, I think, fails because it's basically an argument that there can't be any intent prong. They say that partisan intent is ordinary and lawful in districting, and that comes from the *Vieth* case from a four-person plurality, a four-justice plurality. The rest of the court didn't necessarily adopt that and even the plurality agrees that there is such a thing as unconstitutional partisan gerrymandering in violation of the Equal Protection Clause, and it is Equal Protection Clause 101 that you have to have both discriminatory intent and discriminatory effects.

Defendants throughout their briefs and throughout their presentation tend to lump those two together and mix them up. So they say in their reply brief that we haven't shown that we can show that the partisan intent was excessive. I don't know what that means to have intent that's excessive. You really want to discriminate

against people? I don't know what it means and --

JUDGE RIPPLE: But the object of the intent is an important one.

MS. ODORIZZI: Yes. Exactly, Your Honor. So it's not that the intent itself has to be at a certain level. We know what discriminatory intent is. *Bandemer* tells us what it is. It's the intent to treat a particular political group differently and to denigrate them and to dilute their votes.

JUDGE RIPPLE: There's been a lot of water under the dam since *Bandemer*. Is that still viable?

MS. ODORIZZI: Yes. I think the intent test there is still viable. It was adopted by six justices, and in later cases the court -- people have tried to make the test more manageable by saying well, let's make it a predominant intent. And in *Vieth*, the court really didn't bite on that because they said -- the plurality anyway said predominance -- it's too hard to tell what motive predominates. And in *LULAC*, the plaintiffs there tried the notion that if we can prove it was a sole intent, then we don't have to prove effects, and the Court said no, no, no. Even if it's the sole intent, you still have to prove both intent and discriminatory effect.

So I think that does put us back to *Bandemer*, which

in the normal equal protection standard which is partisan intent, a discriminatory intent was a motivating factor in the plan.

JUDGE RIPPLE: You can have somewhat of a discriminatory intent in this area and be just fine, can't you?

MS. ODORIZZI: You can, Your Honor, but the excessiveness part of it I think comes in the effect part.

JUDGE RIPPLE: Well, are you saying that what is proven in the effect is, in fact, relevant and probative evidence that one had the intent to discriminate at a constitutional magnitude? Is that what you're telling me?

MS. ODORIZZI: It can be, Your Honor. Absolutely. That there is certainly a synergy between the two. You can have a plan, and I'll get to this a little bit later, but you can have a plan that creates discriminatory effects that was not intended.

JUDGE RIPPLE: In other words, what you show in your prong two might be able to substantiate that the defendants did want it to do more than simply favor one party to a permissible degree.

MS. ODORIZZI: That's right, Your Honor. Exactly. And that's how we show that it's excessive

partisan gerrymandering. To show the intent, I mean the state concedes that the Republican leadership had the intent. And we didn't talk about the evidence because in our brief --

JUDGE RIPPLE: Counsel was very careful to say though while he'll concede they had the intent to favor the Republican Party, he will not concede that they had the intent to create a plan that would keep the Republican Party --

MS. ODORIZZI: Right.

JUDGE RIPPLE: -- in control --

MS. ODORIZZI: Right.

JUDGE RIPPLE: -- for the entire period.

MS. ODORIZZI: Right.

JUDGE RIPPLE: Is it necessary to have such an intent --

MS. ODORIZZI: I don't think --

JUDGE RIPPLE: -- to violate the constitution?

MS. ODORIZZI: I don't think it has to be that level, Your Honor. I think the intent to discriminate against an identifiable political group is enough. But if the standard were an intent to maximize your advantage by packing and cracking your opponents as much as possible, if that's the standard, we can meet it here. We can show that that happened here.

JUDGE RIPPLE: Can you meet the intent -- if the standard is that the defendants intended to keep the Democrats out of control for the entire decennial period, can you prove that?

MS. ODORIZZI: That they wanted a durable gerrymander that would last as long as it possibly could?

JUDGE RIPPLE: That's right.

MS. ODORIZZI: I think we can show that, Your Honor, that they thought about that issue and that they thought about it and that they went through various iterations of the plan in order to absolutely maximize their advantage for as long as possible.

JUDGE RIPPLE: My difficulty at least is in that if you want wasteland where the intent was clearly to do more than most state legislatures do, whatever that is.

MS. ODORIZZI: Whatever that is.

JUDGE RIPPLE: And what -- and trying to put it in concrete for the whole decennial period, how would we ever measure the intent in between those two extremes?

MS. ODORIZZI: I don't think you should be measuring intent, Your Honor. I think here that it should be the intent to disadvantage people based on politics; that that's enough. And then you look at the effects, and I think you can have kind of a synergy between the two where you say good Lord, this was the

worst gerrymander, one of the worst in history. Yes, they were planning to do something of exactly that magnitude. That is constitutionally intolerable. They have hit the level where they have both the intentional gerrymandering is constitutionally intolerable.

JUDGE RIPPLE: As I read your pleadings on this, I kept thinking of what would happen would be the usual practice of state legislatures will just get worse and worse and that that line between trying to ice it for the entire decennial period and what's common, the law of the shop, if you want, among state legislators, is just going to increase and increase and increase.

MS. ODORIZZI: That's right, Your Honor. If you have unified control of the redistricting process and it's okay, as defendants say, basically any partisan intent is okay.

JUDGE RIPPLE: What's the constitution -- what does the constitution prohibit? If the state legislatures just get, you know, raw and then more raw and then more raw in the way they do things, at what point is the constitution violated?

MS. ODORIZZI: Well, I think, Your Honor, in our test in that situation where you have unified control and you have proof of partisan intent that the map was drawn with the intent to disadvantage your political opponents,

then you look at the efficiency gap to see what the effects would cause and if the effects are so far out of what has been previously the historical norm for the efficiency gap and it's durable, it's likely to last throughout the entire period, then you have a constitutional violation unless the state can come and show that was really the political geography of this particular state and there was no other way around it. I mean I think that is a discernible test because it's related to the concept that people have to be treated equally and it's a manageable test and it's not going to create a whole raft of new litigation because there are very few plans that actually would be subject to this.

I'd like, if I might, to address defendants' -- one of their big arguments is courts, neutral parties sometimes in the past have created plans with big efficiency gaps. And that's true. And under our test, those plans are not at risk because there's no partisan intent. And counsel said well, we're using intent as, you know, a way of protecting our efficiency gap analysis. But we're using intent and effect because that is the basic equal protection analysis. You look at intent. You look at effect.

You have a lot of cases under the Equal Protection Clause where somebody can say they are discriminatory

effects. Because discriminatory effects happen for a lot of different reasons. But you don't have a claim that the state action violates the Equal Protection Clause unless you can show intent. So this is not anything unusual or strange.

And if you go back to *Bandemer*, I think it's interesting that Justice White noted, if I can find this here, that if you do, if you draw a map in a -- he called it a politically mindless fashion -- where you don't pay attention to partisan issues and to how you're districting and you're looking only at things like compactness and trying to respect boundaries and making sure that you have equal population, he says you can get a gross partisan gerrymander out of that. He recognized that.

And that's what happened in Wisconsin in the 2000's. If you look back at the decision in that case, the court looked and it rejected the plans that were tendered to it because it thought they were too partisan. But then in drawing its own plan, the court didn't look at these partisan issues. Unlike the court in the previous decade which had really tried and succeeded in coming up with a map that was very balanced, the court this time around said we're going to try and do as little as possible to disturb the current boundaries and we're going to

equalize the population. And that had the unintentional effect of creating a fairly large pro-Republican efficiency gap. But that doesn't show that what the legislature did in 2011 was somehow appropriate constitutional because you had an accidental gerrymander. There was nothing accidental about what happened here.

At one point in their reply brief defendants say well, the fact that because of the lawful -- what they called the *lawful partisan intent* of the legislature, there just happened to be this big efficiency gap. It didn't just happen to be. It wasn't an accident. They planned for it and they achieved it.

So in that sense, the fact that we do have efficiency gaps that come out of who knows why they came out of those other maps, that's not relevant because there was no intent in that case. But that doesn't mean that you can create discriminatory effects that are excessive in a case like this intentionally, just like the race discrimination cases we would say.

JUDGE CRABB: I have a question about your proposal. There seems to be agreement among the justices who believe that partisan gerrymandering is justiciable; that court intervention for that kind of partisan gerrymandering should be very limited and it should be limited to extreme situations. And you seem to say that

approximately 20 percent of the plans you could make a prima facie case for showing that they're extreme partisan gerrymandering. So how do we -- how do we narrow this to the few extreme circumstances that the court seems to have been willing to consider?

MS. ODORIZZI: Well, Your Honor, I think Professor Stephanopoulos can give you the exact numbers. I don't have them in my head and he does. But when you take out -- when you look only at the plans where you had unified control of redistricting by one party, which is a good proxy for partisan intent, that cuts the number way down of the plans that would be -- you could challenge. And as to the rest, if they could be challenged, and there's a number of current ones that could be challenged under our standard, those are subject to the standard and in the overall scheme of things there's not that many of them.

So I think the standard works in that it's getting really the outliers. It's getting the ones where you have partisan intent and where you have an extreme efficiency gap that was intentionally created and intentionally discriminates against a particular political group.

JUDGE GRIESBACH: I think, if I understand the defendants correctly, they don't argue that they did not

have intent to benefit the Republican Party. They do not argue that they were compelled to enact this plan because of the traditional considerations. What's at issue here? What are the facts we have to decide?

Is the efficiency gap, is that a standard that we either adopt as a matter of law? Or -- and if so, is that a factual dispute? What are the -- why do you think we need a trial? Why aren't you moving for summary judgment given your position?

MS. ODORIZZI: Well --

JUDGE GRIESBACH: What are the facts that you think we need a trial to hear and to decide?

MS. ODORIZZI: They do -- well, first of all on the intent prong, they've admitted some but not all.

JUDGE GRIESBACH: But your argument is all you need to show is an intent to benefit the parties.

MS. ODORIZZI: Right.

JUDGE GRIESBACH: And you have that.

MS. ODORIZZI: Right. Right. But Your Honors have to decide what they -- they also argue that there is no standard, legal standard for intent. So I'm not sure what they're asking the Court to do except grant summary judgment because it doesn't matter what their intent is.

JUDGE GRIESBACH: My question to you is what do you think are the facts that we have to decide.

MS. ODORIZZI: Well, they've challenged. They have an expert who we haven't challenged who challenges various aspects of the efficiency gap and whether it's the appropriate methodology to use, and we think that, you know, it's looking at those experts and hearing their testimony and you have to decide whether, in fact, the efficiency gap is that test that the Supreme Court has been searching for that enables you to decide and where the line is between, you know, kind of politics as usual and unconstitutional gerrymandering.

JUDGE GRIESBACH: What facts do we need to determine in order to make that assessment, that decision?

MS. ODORIZZI: Well, I think first of all you have to look at the efficiency gap and see if you agree with the way we've used it. We have questions of durability, which again Professor Stephanopoulos, if you want to get into those facts, can talk more about it. And the defendants have challenged those -- some of what we've done on the efficiency gap, and that creates questions of fact.

Just like on the clustering issue which they argued sort of in their brief, we say Democrats and Republicans -- we have expert testimony that Democrats and Republicans are equally clustered in Wisconsin. So to

the extent they want to argue about that it's clustering of adherence of various parties explains the efficiency gap, we have an issue of fact for the Court to decide.

JUDGE GRIESBACH: It's -- I mean it is demographically provable pretty -- and I doubt if there would be much dispute based on whatever statistics as to the density of the particular clusters, the respective clusters, and I think that was the argument here that the Democratic clusters are much more dense than the Republican clusters. But is that -- I mean if we decide that, that decides the case. I'm trying to figure out and understand what specific factual issues we're going to hear about at a trial that we'll need to resolve that will -- that require a trial, I guess, that you think we need to decide in order to determine whether or not the measure you're offering, which is the efficiency gap.

MS. ODORIZZI: Right.

JUDGE GRIESBACH: There's no dispute as to what it is or how it's calculated.

MS. ODORIZZI: Calculated; right.

JUDGE GRIESBACH: So I'm wondering do we need a trial? And what are the facts that we have to decide at such a trial? Where are we going to hear disputes as to facts that aren't a matter of some historical event or record that are already -- you know, that are already in

the record that are not --

MS. ODORIZZI: Well, I think, Your Honor, we didn't move for summary judgment because we viewed this as having a battle of the experts about the efficiency gap and how it applies.

JUDGE GRIESBACH: So every one of these cases will be a battle of the expert? Or did the Supreme Court envision, you know, some -- not multiple -- I mean once we arrive at the standard, now we know.

MS. ODORIZZI: Now we know.

JUDGE GRIESBACH: But I mean is it your view that if, for example, this Court ends up adopting the efficiency gap as a reasonable and manageable standard, that will be still a factual issue in every other redistricting case that comes up?

MS. ODORIZZI: It may or may not be, Your Honor. If you adopt the efficiency gap, it's easy to calculate it and so you may have issues as to intent and you may also have issues on the third prong as to whether or not the efficiency gap is unavoidable. Because of the political geography of the state, we don't have that issue in Wisconsin, but it may be in other states.

JUDGE GRIESBACH: Thank you.

JUDGE CRABB: Who do you think should have the burden of proof on that last question?

MS. ODORIZZI: On that last question, we think the burden should shift to the state. Once we've shown both intent and that the gerrymander is excessive under the efficiency gap, they should have to explain. They're in the best position to explain. They say that's not fair, you know, and that they don't like the unavoidable standard, but what other standard would you use when they've done this with the intent to give themselves a partisan advantage.

JUDGE CRABB: Are you proceeding from the one-person, one-vote cases when you say that the burden should be --

MS. ODORIZZI: Yes.

JUDGE CRABB: -- on the defendants?

MS. ODORIZZI: Yes. And also, I mean, they say here we've reverse engineered a Demonstration Plan. But Professor Gaddie, who was their expert before the fact, made the same predictions. We could have used his predictions and come up with the same thing because he was remarkably accurate about how the districts would perform. If we translate what he did into our efficiency gap, he gets the same efficiency gap that we found after the election. So...

JUDGE CRABB: Do you know of any case in which the Supreme Court or any justice of the Supreme Court has

said that the burden should be on the defendants to show that the gerrymandering was unavoidable?

MS. ODORIZZI: No, Your Honor. I think that this is, you know -- this is -- we proceed from the one-person, one-vote cases because there there's a presumption that when you are over a certain limit, that it's unconstitutional. Here we think you should have a presumption when you have both intent and the proper amount of effect that when you've gotten to that level, you have excessive partisan gerrymandering, then you also should have a presumption.

And, you know, it's interesting because their opening brief says very confidently that Wisconsin is a pro-Republican state. It's just political geography. And then in their reply they say well, that's too high a burden. You can't put that burden on us. And it's impossible and plaintiffs could always do it. But if you read the Chen article, which they rely on, which talks about Florida, it says in Florida it would be unavoidable, because according to this article, they say that the way Democrats are clustered in Florida, the only way to create districts that were balanced under an efficiency gap analysis would be by creating snake-like districts coming out of the -- one of the cities.

So there would be a place for defendants in some

states to be able to come back and say we had to do this in order to preserve ordinary districting rules.

JUDGE CRABB: Are you imposing a standard of necessity?

MS. ODORIZZI: We are of being unavoidable, but of course, you know, all of these standards are subject to whatever Your Honors decide they should be. And whatever it is, we think we can meet it on the facts of this particular case.

On the clustering point, I think for purposes of summary judgment that that's really a question of fact. So to the extent defendants are still relying on clustering and those maps that are in their brief, those are all the question of facts. Because as I say, our Professor Mayer, who does have a Ph.D. and used the kind of analysis that a social scientist used -- uses to decide population clustering, said Democrats and Republicans in Wisconsin are equally clustered. So that's really not an issue in this state. And at the very least, there's a question of fact.

JUDGE CRABB: If I could go back to this justified necessity factor. If you said that the defendants had to show that the plan they are using was necessary, isn't that -- anything could be necessary.

MS. ODORIZZI: Well, I think --

JUDGE CRABB: The realm of plans that they could propose.

MS. ODORIZZI: Right. What they would have to be able to show is that their supernormal, if you will, efficiency gap, pro-Republican efficiency gap is really inherent. And yes, they could draw different maps. But no matter what map they drew, so long as it adhered to the other requirements of districting, it would produce a similar kind of efficiency gap. I don't think they have to show that these particular district lines were absolutely necessary, but what they have to show is that any alternative would have resulted in roughly the same kind of excessive, if you will, efficiency gap.

I'm going to say two words about Mr. Trende before I sit down and let Professor Stephanopoulos talk. We have a lengthy motion. We think the motion in limine should be decided before trial so nobody wastes their time and effort preparing and you don't waste your time listening to something that isn't admissible under *Daubert*. Mr. Trende does not have a Ph.D. But it's not just that he doesn't have a Ph.D., he didn't even read the literature on this issue and there is literature on how you do clustering studies. He did not employ the kinds of methodologies that social scientists do to decide clustering. Instead he came up with his own methodology,

which at the end of the day doesn't show you anything because it only shows geographic clusters, and when you're doing districting, how far people are away from each other, you know, if something is blue on a map in a county really doesn't matter because the question is how can you district. Where is the population. And Trende doesn't deal with that at all. So... (11:11 a.m.)

THE COURT: Professor Stephanopoulos.

MR. STEPHANOPOULOS: Thank you, Your Honor. May it please the Court.

I'd like to begin by saying a few more words about defendants' principle argument which is that there's no problem with or there is a problem with the efficiency gap because it's not exclusively a product of partisan intent, and then I'll address some other major issues that have come up during the argument with respect to the durability of gerrymandering, with respect to the workability of the third prong of our test, and with respect to the constitutional roots of our proposal.

So the single argument the defendants hammer at throughout their briefing is that it's a fatal flaw with the efficiency gap; that it has causes other than partisan intent. And I think there are several things to say about that. This is just an error of law on the part of the defendants.

First of all, they're repeating the mistake that the *Bandemer* plurality identified, which is to conflate, to blur the intent and effect prongs. It's clear both in the partisan gerrymandering context and in equal protection law more generally that the discriminatory effect does not have to stem exclusively from the discriminatory intent that underlies a challenged policy. The discriminatory effect has to stem from the policy that's being challenged, which in this case is a district plan, but it does not have to stem 100 percent from whatever discriminatory motivation underlies that policy. And the court has said so in *Bandemer*.

I would also point out that this supposed weakness of the efficiency gap is also a weakness of any conceivable measure of partisan effect in this area. So whether you look at partisan bias, which is the metric the court considered in *Vieth*; whether you consider something cruder like simple disproportionality, all of those other measures of partisan effect also are functions of (a) partisan intent, (b) political geography, (c) the candidates who are running. There's nothing distinctive about the efficiency gap in this regard.

I'd also point out that the partisan bias figures that the court itself cited in *LULAC* did not attempt to

make any adjustment for the proportion of the partisan bias that was attributable to the Texas legislature's partisan intent. They were raw partisan bias figures. There is no hint that those numbers had to be changed or modified in some way to reflect only the contribution of the Texas legislature's partisan intent.

And furthermore to the extent that causality matters here, that's specifically the point of the third prong of our proposed test. So if, in fact, it turns out that there are innocent explanations for a large efficiency gap, that's going to come out when the state tries to make its showing at the third prong. So there's no need for that causality question to also be intertwined with the second element, the calculation of efficiency gap itself. And so let me turn then to that burden-shifting inquiry which has been a topic of conversation.

So first of all, I would say we've plucked the language for that third prong directly from the Supreme Court's one-person, one-vote cases. If this court wants to adapt or modify the third prong, we don't have an objection. But we thought that the most reliable intuitive place to look to figure out how this prong should operate are the court's one-person, one-vote precedence like *Brown v. Thompson*, like *Connor v. Finch*, like *Voinovich*. So we envision the same exact inquiry

taking place here at the third stage as takes place in the one-person, one-vote cases at the third stage.

Now, is this an impossible burden for the state to carry as defendants claim? Clearly not. When the same precise question presents itself in the one-person, one-vote context, states routinely are able to demonstrate that large population deviations were the necessary product of some legitimate state policy like respecting county boundaries. Ohio succeeded in making that showing in *Voinovich*, Virginia succeeded in making that showing in *Mahan v. Howell*, and there are other similar examples.

Moreover, it will often not be the case that a Demonstration Plan like Professor Mayer's will be possible. So my co-counsel mentioned the example of Florida where if you credit Chen and Rodden's analysis, it would not be possible to come up with a map that has a low efficiency gap and that complies with traditional redistricting criteria as well as the actual map in Florida. That's because Florida's geography prevents this kind of map from being drawn.

Judge Crabb asked whether there's any precedent in partisan gerrymandering law specifically for this kind of burden-shifting inquiry, and the answer actually is yes to that. So when Justice Stevens first addressed

partisan gerrymandering in *Karcher*, he suggested that if a state could produce legitimate justifications for its plan, and this again is a plan that is intentionally and significantly discriminatory against a particular group, those legitimate justifications would rescue the plan.

The *Bandemer* plurality said the same thing, that once you finish with the intent and effect prongs, you also ought to consider what potential legitimate justifications might underlie the plan. And Justice Souter more recently in *Vieth* also said the same thing, that the fifth of his five stages in his proposal was whether there happened to be -- whether the state can show that there happened to be legitimate justifications underlying its plan. So there is precedent for this sort of burden-shifting inquiry, not only in one-person, one-vote law, but also in partisan gerrymandering law, including in a plurality opinion in *Bandemer*.

Let me address the issue of durability which has come up in Judge Ripple's comments in particular. We agree that the durability of a gerrymander is a very significant consideration in this area. The *Bandemer* court clearly said that durability was central. In fact, durability featured in the specific legal test that the *Bandemer* plurality adopted. You know, was there a consistent degradation of a group of voters' influence on

the political process. And so we think that the partisan effect that has to be demonstrated in these cases is that a plan both significantly and durably disadvantages the supporters of a particular party.

We think if there's evidence that the bias would not be durable, that ought to be considered and it ought to weigh heavily against the plaintiffs in this kind of case. And so we've presented evidence that Wisconsin's Act 43 is extremely likely to retain a very large pro-Republican bias throughout the decade, no matter what sorts of changes in the electoral environment take place.

In fact, the plan is skewed enough and durably skewed enough that it would give Republicans a lockhold on the legislative majority even if Democrats are able to win a substantial majority of the popular vote. This is one of the scenarios that Professor Mayer tackled in his rebuttal report and he found that the -- that Act 43 retains its large efficiency gap and retains a Republican majority even in the face of a Democratic waive election like that of 2006 or 2008. So we think durability matters and we think it's clearly demonstrated here.

On the intent side as well, we would have no objection to taking durability into account. And here also its present. There is overwhelming evidence that the drafters of Act 43 did not only intend to

significantly benefit the Republicans, they also intended to durably benefit the Republicans. And we'll be presenting explicit evidence to that effect at trial, that they considered both the magnitude of the expected bias and the durability of the expected bias when they were crafting Act 43.

Let me turn to an argument that defendants' counsel made repeatedly which is that there are no constitutional roots to plaintiffs' proposed approach, and let me outline what I see as the constitutional roots of the approach. The proximate constitutional foundation is the principle of partisan symmetry in which five justices expressed interest in *LULAC*. So a majority of the court expressed at least some interest in that principle. Partisan symmetry again is just the idea that the electoral system has to treat the major parties symmetrically when it comes to the conversion of their popular support in the state into legislative representation.

Now, that principle of partisan symmetry didn't come out of nowhere in *LULAC*. It's also implicit in all of the court's partisan gerrymandering decisions. Every time the court defines the practice of partisan gerrymandering, it does so in language that is clearly consistent with the principle of partisan symmetry.

That's true in *Vieth*, it's true in *Bandemer*, it's true in the more recent Arizona state legislature decision, it's true throughout.

And furthermore, this principle of partisan symmetry itself has clear constitutional roots in well-established doctrines under the First Amendment and the Fourteenth Amendment. So it's very clear that there's an individual right for the voter not to be discriminated against based on the voters' political views or partisan affiliation. That's true in the First Amendment context, in the political patronage cases like *Elrod v. Burns*, and it's also true in the Fourteenth Amendment right-to-vote context in cases like *Harper* and *Crawford* where the court explicitly says that partisan justifications are not a valid reason to burden the exercise of the franchise.

So I think here we have a principle recognized in *LULAC* that is just an articulation of an idea that's been floating around all of the Supreme Court's partisan gerrymandering decisions and that is just the obvious corollary at the party level of the fundamental individual principle that you can't discriminate against somebody based on their political views or party affiliation.

Now, defendants say how in the world could you constitutionalize something like a two-to-one

seat-to-vote relationship, and they return to that point numerous times. And of course you wouldn't constitutionalize a two-to-one seat-to-vote relationship or any other seat-to-vote relationship. With the full method for calculating the efficiency gap, there is no necessary seat-to-vote relationship that's implied. With the simplified method for calculating the efficiency gap, there is also no seat-to-vote relationship implied whenever the efficiency gap is not precisely equal to zero. And if we allow, for example, the efficiency gap to vary between, say, plus or minus 7 percent, that allows any of myriad different seat-to-vote relationships to occur. So the Court would absolutely not be entrenching or constitutionalizing any particular seat-to-vote relationship by adopting our approach.

And moreover, to the extent that the efficiency gap prods or encourages states to move toward the two-to-one relationship, that's a positive consequence. This is the historical norm for generations in American elections at both the state legislative and the congressional level. The fact that this is the norm is precisely why the defendants' own expert uses a measure effectively identical to the efficiency gap in his own analyses. He recognizes that the efficiency gap is really measuring the deviation of a particular plan from historical norms

and that's the same appeal that we see for the efficiency gap, that it really captures the extent to which a plan is more gerrymandered than you would expect based on the historical norms that have applied for generations in American elections.

JUDGE CRABB: Excuse me. Can I intervene?

MR. STEPHANOPOULOS: Sure.

JUDGE CRABB: At one point in your brief you say the court could use partisan bias in addition to the efficiency gap if the court thinks the efficiency gap is not as sufficient. How would that work?

MR. STEPHANOPOULOS: So we envision that working sort of as a robustness check. So we have these two different measures of partisan symmetry out there: There's the older measure partisan bias and there's the more sophisticated newer measure of the efficiency gap. We might worry if partisan bias tells us that a plan is completely fair when the efficiency gap tells us that a plan is manifestly unfair. There are reasons in that conflict scenario to prefer the reading that's given by the efficiency gap. But to the extent that both of the metrics are consistent, that provides a court with even more of a basis for concluding that a particular plan really does have a very lopsided partisan impact.

And here that's absolutely the case. So the Act 43

had nearly identical partisan bias scores in both 2012 and 2014, as it did efficiency gap scores. So here both the older metric and a newer metric are completely consistent in the message that they're sending, which is that Act 43 is one of the most egregious and most tilted plans that had been observed over the last 40 odd years or so.

JUDGE CRABB: Do you know any other measures for determining partisan symmetry other than these two?

MR. STEPHANOPOULOS: These are the two that are featured in the literature. I suppose even older than partisan bias would be just literally to compare the seat share and the vote share for a party and just to look at the difference between the two. But that is literally a measure of the deviation from perfect proportionality. And so it's clear that that measure is prohibited by the court's precedence. That would tell you how much a plan is disproportional relative to perfect one-to-one proportionality. That can't be the test in this area.

But I can tell you though that -- so since the concept of partisan symmetry emerged, partisan bias was the first and the only scholar-designed measure of partisan symmetry up until the last few years when the efficiency gap also emerged in order to address some of the deficiencies that had been identified with partisan

bias. I'm happy to address those deficiencies if that's of interest to the Court.

JUDGE CRABB: That's okay.

JUDGE GRIESBACH: I want to ask you the same question I asked Ms. Odorizzi, Mr. Stephanopoulos. What facts do you think we need to decide in order to make the judgment, arrive at a judgment that the efficiency gap is that elusive standard that the Supreme Court has been seeking all these years? What factual disputes do you think exist here that would -- we'll be resolving at a trial in this case?

MR. STEPHANOPOULOS: Sure. So I think there are factual disputes related to Wisconsin's own facts, but I take Your Honor to be addressing the more general question of what facts are in dispute with respect to the efficiency gap and with respect to setting a general standard as opposed to the particular case at hand.

So defendants have made a host of factual arguments that the efficiency gap is too volatile, too changeable from election to election; that a 7 percent threshold is not reasonable. Maybe the threshold has to be calibrated up or down. They've argued that the clustering of Democratic and Republican voters has some impact on the efficiency gap, but we don't know yet how much of an impact. And we also don't know whether that's a legally

significant fact or not.

The question of avoidability, so was a large efficiency gap avoidable, is also, I think, a quintessentially factual question on which the parties differ.

JUDGE GRIESBACH: I thought that was conceded here.

MR. STEPHANOPOULOS: What's that?

JUDGE GRIESBACH: I thought that was conceded here. I mean as I see this, intent and avoidability are really not in dispute.

MR. STEPHANOPOULOS: Well, I don't believe, if we went to trial, the defendants would concede those two points. Maybe they would and we would be happy to accept those concessions. I think that they would likely offer justifications, reasons for the large efficiency gap that we observed. I think it's likely they would claim that Act 43's large efficiency gap is the result of a pro-Democratic -- I'm sorry, pro-Republican political geography in the state of Wisconsin. Certainly they've argued at length in their briefing that Wisconsin has a natural pro-Republican geography and this accounts for large efficiency gaps. I take that to be specifically an argument about whether a large efficiency gap is or is not inevitable in Wisconsin.

So without knowing what particular stipulations defendants would make, I think it's hard to answer the question, but certainly their brief suggests that there are disputed factual issues at the third prong as well.

JUDGE GRIESBACH: Thank you.

MR. STEPHANOPOULOS: Let me address now one of Judge Crabb's questions from earlier about the volume of plans affected. So when defendants comment on the volume of plans affected, they completely overlook the first prong of our test. They assert that you would have to jeopardize all plans that are over "X" percent in their efficiency gap, whether that's in the first election or in any election over the course of the cycle. That's incorrect because our test does have these multiple prongs. You would also have to make sure that partisan intent was present.

Once we take partisan intent into account, at least by proxy by looking at how many cases are there where a single party had unified control over redistricting, the number of potentially affected cases drops dramatically to a few dozen all time, and only roughly ten today. And these numbers, I think, ought to be taken in perspective relative to the enormous volume of redistricting litigation that has taken place in the past and that currently takes place.

So in a world where the one-person, one-vote principle led to hundreds of plans being invalidated and in a world where Section 2 of the Voting Rights Act has prompted hundreds upon hundreds of lawsuits over the years, in a world where in every cycle there are hundreds of cases in almost every state resulting in roughly two dozen plans being either invalidated or drawn by the courts, it's only an incremental increase if another ten plans might be in some jeopardy under plaintiffs' proposed test. So this is not a dramatic increase in the degree of judicial intervention in this area. We think it's a degree of judicial intervention that's perfectly consistent with current practice.

We'd also point out that to the extent the numbers of problematic plans still seem high, that's because the practice of partisan gerrymandering is ubiquitous and very severe. So if you have a clearly undemocratic practice taking place around the country, it doesn't strike us as a bad thing if there are a number of cases that emerge to tackle that undemocratic practice and to curb that undemocratic practice.

Let me also address one of counsel's arguments about the changeability of the efficiency gap. So counsel rightly points out that the efficiency gap can vary somewhat from election to election. That's because

different candidates run. National trends go in different directions in different years. But empirically this was one of the principal things that Professor Jackman examined in his two reports, just how volatile is the efficiency gap. What he found is that the vast majority of variability of the efficiency gap is across plans, not within plans. So within plans, you have a relatively high level of stickiness of the efficiency gap. Across plans, you see significant differences in the efficiency gap consistent with different plans being more or less symmetric in their treatment of the parties.

Professor Jackman also included a great deal of evidence on the dependability of the first score that you observe under a plan. And what he found confirms the plaintiffs' view that the efficiency gap is a sufficiently robust and reliable metric to be used in litigation. So he found that the first efficiency gap recorded predicts with a quite high degree of precision the lifetime average efficiency gap of the plan. So if a plan opens with a great deal of asymmetry, we can be quite confident that this plan over its lifetime will end up averaging out to have been a quite a symmetric plan.

He also arrived at extremely high confidence rates associated with the 7 percent threshold that he recommended. He further found that the rate of false

positives would be extremely low with a 7 percent threshold. So in other words, with a 7 percent threshold, the volume of cases where you might have thought based on the first efficiency gap that the lifetime average of the efficiency gap would be in the same direction, but it turns out that the lifetime average actually was in the opposite direction. There are very few of those cases, lower than 5 percent, with an efficiency gap threshold of 7 percent.

And he further found that if you take all of the current plans in effect around the country and you shift them by up to 5 percentage points in either direction, the original efficiency gaps end up being overwhelmingly highly correlated with the efficiency gaps that you get after you do the shifting. So this again addresses Judge Ripple's concern about durability and it shows us that current plans with large efficiency gaps have very durably very large efficiency gaps. They're going to preserve their current level of asymmetry under just about any electoral environment that you can realistically conceive of over the remainder of the decade.

I'm coming to the end of my points so I'll be happy to sit down soon. With respect to the changeability, defendants complain that it's arbitrary to focus on the

first election and instead any analysis ought to take into account all of the elections under a plan. But there are good reasons for focusing on the first election. First of all, based on Justice Kennedy's comments in *LULAC*, it appears that lawsuits before the first election are not allowed because those would be based on a counterfactual state of affairs. So the first election represents the moment at which lawsuits are allowed to be filed.

Second, plaintiffs are going to have every incentive to file suit as soon as they're allowed to. If they wait, that's another election that they have to endure under a plan that they consider to be fundamentally unconstitutional. And moreover, if plaintiffs wait until two or three or four elections have occurred under a plan, they won't be able to cherrypick the efficiency gap scores that look best for them. They'll have to accept the record as they find it, which will include all of the efficiency gaps that have been produced by that plan.

So here, for example, we absolutely could not ignore the 2014 efficiency gap score of Act 43. That's played a central role in our litigation and we think the same would be true any time that plaintiffs sue after multiple elections have taken place. They'll have to accept and work with and deal with all of the observed scores that

the plan has generated.

I think I've covered the points I wanted to hit, so let me close with two final brief observations. The first is how factual most of defendants' arguments are. So in their opening brief in particular, they've raised the issues of how geographically clustered are the two-party supporters in Wisconsin? How geographically clustered are the two-party supporters in the nation as a whole? How many plans would be jeopardized by plaintiffs' proposed test? How variable are efficiency gap scores from election to election? Did Professor Mayer and Professor Jackman make certain methodological mistakes or did they rely on certain problematic assumptions in carrying out their analyses? These are exactly the kinds of contested factual issues that can't be resolved at this stage and that require a trial to be decided.

And the second point is just to reiterate the defendants don't even try in their briefs to argue that Act 43 would be valid under plaintiffs' proposed test. And I think that's for good reason. There's overwhelming evidence that the plan was devised in order to maximize the number of districts the Republican candidates would win. Prior to the current cycle, there wasn't a single map in American history or modern American history that

was as severely asymmetric as the current plan in its first two elections. And it's also clear that this extreme level of asymmetry was immanently unavoidable. The Wisconsin Legislature easily could have, but chose not to, devise a plan that would have been much more fair to both parties and also would have accomplished all of its legitimate objectives just as well.

So our view is that if the courts are ever going to curb the deeply undemocratic practice of partisan gerrymandering, this case presents as good a place as could be imagined to begin that project.

Thank you, Your Honors. (11:42 a.m.)

JUDGE RIPPLE: Thank you, Professor. And we'll hear now in rebuttal Mr. Keenan.

MR. KEENAN: Well, I'll start by saying that the plaintiffs' argument assumes what the definition of fairness in a districting plan is is equal results of elections in converting votes to seats. But that's not what the Supreme Court has said that fairness in districting is. Both the federal courts in the District of Wisconsin in 1990 and 2000 were trying their utmost to be fair in districting. Those plans have resulted in very asymmetric results.

Now in 2010 when Republicans win control of the legislature, what the plaintiffs would demand is that the

Republicans enact a plan that's actually less favorable to themselves than the one that's been in place for 20 years.

This just can't be the standard for partisan gerrymandering claims to have a standard that would require such results when partisan motivation just isn't unconstitutional. I would say that that's not just a finding of or a holding of the *Vieth* plurality. The appropriateness of considering political factors is also in *Gaffney v. Cummings*, which is a majority decision of the Supreme Court.

I think the problem is that the plaintiffs say this is extreme or an outlier or -- I'm trying to see some of the other terms used, but it's not. The elections that were seen in Wisconsin are actually entirely consistent with what just happened last decade. Mr. Stephanopoulos says well, the first two elections in this plan are just as, you know, have the highest efficiency gaps of any plan prior to this cycle. Well, that's true in the first two elections, but if you look at last time in Wisconsin, there is efficiency gaps of negative 10 and negative 12. They happened to occurred in 2004 and 2006 so they aren't the first two elections in the cycle, but they were two elections in that plan. And so to the defendants, you can't look at the first two elections under this plan and

then conclude that there's extreme partisan gerrymandering going on when we saw the exact same results under the last plan which was enacted by disinterested federal judges.

I think that's the key is they say it's out of the norm. Well, the norm of what? The norm in Wisconsin as seen is what was seen in the last two plans. Why is Wisconsin being judged against the norm of all the other states dating back to the 1970's and 1980's when the political conditions were quite different? Frankly, I don't know that it is possible to have a standard like this that would apply to every single state equally because each state is different.

They also say that it would affect relatively few plans, but that's just not true. I mean in this last cycle, their own expert says when you consider partisan intent, 25 percent of plans are being implicated at the 7 percent threshold and 16 percent at the 10 percent threshold.

I think some of this is like what is a partisan plan. Well, they just say a partisan plan is one with a asymmetrical result, but if you look at the *Baumgart* case, it rejected the Democrat's plan as too partisan, not because of the results but because, in their words, they said the plan -- the district in Madison by starting

at the state capitol and lines radiating out in the shape of a pizza, kind of a pizza-mander, that it's a way to maximize their seats. It wasn't -- that was partisan because it was ignoring traditional districting principles to create more Democratic seats. It wasn't -- but under the plaintiffs' standard that might be totally appropriate if statewide you end up with a more balanced map. But the districting decisions aren't judged just on the pure statewide vote as the Supreme Court makes clear that there's individual districts that candidates have to win, not just a statewide vote total yielding into a seat chair.

Mr. Stephanopoulos said that the efficiency gap doesn't make a particular seats-to-votes relationship constitutional, but it does. I mean the way they've structured their test is based on the one-person, one-vote, and the one-person, one-vote takes that deviation from equal population. You get to a certain point and then you're presumptively unconstitutional. Well, the reason that is is because that is actually the constitutional rule is equal population and that is what is normalized. Well here, you're going to take the efficiency gap and make that your baseline and see how far you deviate from it. Well, if that's not constitutionalizing the seats-to-votes relationship, then

I don't even really know what it's doing.

And I think just to reiterate the durability point, I would just like to clarify that their expert examined the durability of the efficiency gap, not the durability of party control of the House. Judge Ripple had asked about whether I was getting into a dispute of Findings-of-Facts land about how the efficiency gap did not translate, but our proposed finding 185 was not disputed. The plaintiffs say it's undisputed that the sign of the efficiency gap does not necessarily correlate to control the state legislature or that in five of the seven plans enacted under unified party control -- this is from the Jackman chart -- the party in control of the state House changed despite the fact that the efficiency gap remained the same sign.

So the efficiency gap in all the tests Jackman has done are looking at the efficiency gap, they're not necessarily looking at control of the state House and showing that that is durable. In the uniform swing they do, that's the same thing in that his analysis looks -- well, say you shift the votes from 50 percent to 51 percent. That will change seats, but what he's measuring is then on the 51 percent line, how does that compare to the expected 52 percent share, not whether it's giving you control of the legislature.

And I think the main problem here is that the plaintiffs say this is a traditional equal protection case, but if that's really the case, then there is no protected class here. Shouldn't we just be in rational-basis review? Shouldn't the defendants just be able to say there is a rational basis for our plan? The plaintiffs have another plan, which they say is equally rational with a better result for the Democrats, but in a rational-basis review, that wouldn't be enough to invalidate a plan.

And I think going to Judge Griesbach's point, I also am not sure what we would try in terms of establishing the efficiency gap as a standard. We've put forward what I think is a fair view of what the plaintiffs' experts did as the basis for our motion and our argument is that that just isn't enough to constitutionalize the standard. I'm not sure what more you get by having Professor Jackman or Professor Mayer get up on the stand and testify to that.

I think to the extent the way this third part of the test works, I guess I would want to be able to meet the test if it truly isn't satisfied by the mere presence of the Demonstration Plan. I'm a little bit confused by the wording unavoidable and necessary. It seems like it's impossible to meet for a state. But to the extent it's

not, I guess I would like to put in evidence on that.

JUDGE GRIESBACH: Why don't you think that the factual assertions that Mr. or Professor Stephanopoulos mentioned aren't proper factual issues that this Court needs to determine in order to assess whether the efficiency gap is that elusive standard the Supreme Court has been looking for?

MR. KEENAN: Sure. And I think that the facts that we've used are not disputed, it's what the Court wants to make of those facts. I mean we've just tried to accurately lay out what the plaintiffs' experts have done --

JUDGE GRIESBACH: Apparently there's a significant dispute over clustering.

MR. KEENAN: And I say that clustering, you don't need to make a finding on that. So that could just be avoided. But in terms of what the plaintiff -- we're relying primarily on the --

JUDGE GRIESBACH: Isn't clustering part of your argument as to why efficiency gap isn't a fair measure?

MR. KEENAN: It's context to explain why we've seen efficiency gaps in Wisconsin. I think, one, they haven't actually disputed the evidence we've offered on that. But further, I don't think it's necessary to make a particular finding on that. It is undisputed that

their proposal of it --

JUDGE GRIESBACH: If it exists, then it does skew that type of thing.

MR. KEENAN: It's something that would have to be considered in a standard it would seem; that it's recognized in Supreme Court case law that the geographic distribution of your voters is going to affect how you translate a statewide vote into seats. So that's something that should be considered in a legal standard that's trying to show partisan gerrymandering. The plaintiffs' first two steps don't look at it at all. We think that's a weakness.

JUDGE GRIESBACH: Do you think there are factual disputes as to the intent of the legislature?

MR. KEENAN: I would say for purposes of the summary judgment motion, I don't think so. I think there might be --

JUDGE GRIESBACH: At trial are there going to be factual disputes?

MR. KEENAN: Depending on what this intent element ends up being, there could be. The way the plaintiffs have phrased it where you just needed like a bare intent --

JUDGE GRIESBACH: You're not going to admit you intended to violate the constitution.

MR. KEENAN: Yeah. And I think as we discussed earlier, there's not going to be an admission that -- I think the witnesses would testify that they did not intend to maximize Republicans seats; that there was other concerns that would limit how much you really could maximize the seats.

JUDGE GRIESBACH: Nor would the individual members?

MR. KEENAN: The legislators, you know, just a host of different things, that would just -- the individual legislators, demands from the legislature what their districts should be, things like that.

JUDGE GRIESBACH: So there's no dispute they wanted an advantage.

MR. KEENAN: Yeah, there's no dispute on that, to that point. Now, to the extent this element goes other ways, maybe there's disputes to the extent --

JUDGE GRIESBACH: And there's really no dispute that they could have designed a plan that would have given them less advantage.

MR. KEENAN: Yeah.

JUDGE GRIESBACH: And consistent with the rules governing traditional redistricting.

MR. KEENAN: Yeah. I think there's no dispute that a different plan could have been enacted that had a

better or less advantageous results for the Republicans. There's probably -- I think that there's probably also no dispute that there probably could even enacted a plan that would be more favorable to them. So like depending on how the third prong goes, if it really is truly like the one-person, one-vote, that test is about whether you were advancing a legitimate state policy, not about whether it's necessary and unavoidable. So if that's it, then we would need to put in evidence to show, like, that there is, you know, legitimate reasons behind the decisions that were made.

But in terms of using the efficiency gap and using the intent element as the plaintiffs have described it, I don't know what facts we're going to be trying at a trial on that. We've, I think, made a fair representation of what the plaintiffs' experts -- what the support is for using those standards. And there's no dispute about what they did and what they didn't do. It's just like what to make of that as a legal matter, which is a question of law for the Court, not really a political science issue.

And I guess I would just like to close with, like, the partisan bias and partisan symmetry. The plaintiffs act as if that's been constitutionalized and it's been accepted as a constitutional principle, and it hasn't. Justice Kennedy says he wouldn't use it alone. He didn't

say that his problems with it were like very specific, that he really likes it. But, you know, just address these few concerns. It was like skepticism about it. But maybe in the future it would provide some guidance. But there is no holding that that type of analysis really should guide -- should be what determines these claims.

I think that's all I have. Unless there's any further questions, I'll sit down.

JUDGE RIPPLE: Thank you, Mr. Keenan. The Court would like to express its deep thanks to all counsel for elucidating the very complex issues that we have to wade our way through in this case. It's been a very informative morning and we very much appreciate it and we'll take the motion under advisement.

The Court will rise and determine a date depending on a decision.

(Proceedings concluded at 11:55 a.m.)

I, LYNETTE SWENSON, Certified Realtime and Merit Reporter in and for the State of Wisconsin, certify that the foregoing is a true and accurate record of the proceedings held on the 23rd day of March 2016 before the Honorable Barbara B. Crabb, the Honorable William Griesbach and the Honorable Kenneth Ripple, in my presence and reduced to writing in accordance with my stenographic notes made at said time and place.

Dated this 25th day of March 2016.

___/s/_____

Lynette Swenson, RMR, CRR, CRC
Federal Court Reporter